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joint interest in a joint estate; but here, for reasons already given, their Lordships regard the plaint as of a totally different character, indicating a distinct intention, to which effect is given by the judgment, of obtaining a separation of estate, and as regards both the real and personal property.

For these reasons their Lordships are of opinion that the decree of the High Court is right, and they will humbly advise Her Majesty that that judgment be affirmed, and that both appeals be dismissed.

Appeal dismissed.

Agents for the appellant: Messrs. *Watkins and Lattey.*

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice McDonell.

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July 15.

LAIDLEY AND OTHERS (PLAINTIFFS) v. GUNNESS CHUNDER
SAHOO (ONE OF THE DEFENDANTS).*

Sale of Under-tenure—Mortgagee—Right to Notice.

The right, title, and interest of *A* in a certain under-tenure was sold in execution of a decree for rent obtained against him by *B*, and purchased by *B* himself. *B* at the time held another decree against *A* for arrears of rent for the same under-tenure. *C*, to whom *A* had previously mortgaged the under-tenure, thereupon having foreclosed the mortgage, instituted a suit for possession against *A* and *B*, and obtained a decree for possession.

After this decree, but before *C* got actual possession, *B* caused the under-tenure to be sold in execution of his other decree against *A*, and again became himself the purchaser. *C* having shortly afterwards obtained possession under his decree was dispossessed by *B*, who took possession through the Court under his second purchase. *C* thereupon instituted proceedings under s. 269, Act VIII of 1859, in which he was successful, and consequently regained possession. In a suit brought by *B* to set aside those proceedings, and for adjudi-

* Special Appeal, No. 1406 of 1877, against the decree of L. R. Tottenham, Esq., Judge of Zilla Midnapore, dated the 17th of March 1877, modifying the decree of Baboo Jadoo Nath Roy, Subordinate Judge of that district, dated the 9th of December 1876.

caution of title,—*Held*, that *B* had a good title to the under-tenure, and that he was not bound before bringing the under-tenure to sale under his second decree to give notice to *C*.

Nobeen Kishen Mookerjee v. Shib Pershad Pattuck (1) discussed.

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THE facts of this case were as follows :—The plaintiffs, Messrs. Robert Watson & Co., were the ijaradars or farmers of a zemindary in which the defendant Khetter Mohun Beshoye held a jote or under-tenure of the lands in dispute (2).

On the 9th of June 1870 the defendant Khetter Mohun Beshoye mortgaged this jote to the defendant Guinness Chunder Sahoo. In June 1873 the debts secured by the mortgage being unpaid, the defendant Guinness Chunder Sahoo served the defendant Khetter Mohun Beshoye with notice of foreclosure.

Shortly after the issue of this notice the plaintiffs attached and brought to sale the right, title, and interest of the defendant Khetter Mohun Beshoye in execution of a decree which they had previously obtained against him for arrears of rent for the Bengali year 1278 (which had become due on the 12th of April 1872), and having themselves become purchasers of his right, title, and interest at the sale in execution, obtained possession of the jote in question some time in August or September 1873. They made this purchase with notice of, and subject to, the rights of the defendant Guinness Chunder Sahoo created by the mortgage of the 9th of June 1870. The plaintiffs had also obtained a decree against the defendant Khetter Mohun Beshoye for arrears of rent for the Bengali year 1279 (which had become due on the 12th of April 1873), but being in actual possession of the jote lands they did not at the time proceed to enforce this decree by attachment and sale of the under-tenure. Subsequently in the year 1874, and after the expiration of the year of grace (that is to say, some time in or after the month of June 1874), the defendant Guinness Chunder Sahoo instituted a suit against the defendant Khetter Mohun Beshoye for possession of the mortgaged jote, and to this suit he made the

(1) 8 W. R., 96.

1869, ss. 59 to 66, to be sold in execu-

(2) It is an incident of such an execution of a decree for arrears of rent under-tenure that it is liable, under against its registered holder. the provisions of Beng. Act VIII of

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plaintiffs, who were in possession of the jote, parties. In this suit a decree was made on the 29th December 1874 against both the defendant Khetter Mohun Besboye and the plaintiffs. The ground for the decree, so far as it was against the plaintiffs, was that, at the sale in execution of their first decree against the defendant Khetter Mohun Beshoye, they had purchased not the under-tenure, but only the right, title, and interest in it of Khetter Mohun Beshoye, and so had in fact purchased nothing (1), and could not therefore remain in possession without paying off the debt due on the mortgage. After the decree so obtained against them by the defendant Gunness Chunder Sahoo, and before he obtained actual possession under his decree, the plaintiffs caused the under-tenure to be seized and sold in execution of their decree for arrears of rent for the Bengali year 1279, and at such sale, on the 15th March 1875, themselves purchased the under-tenure. On the 22nd of May 1875 the defendant Gunness Chunder Sahoo took actual possession of the under-tenure in execution of his decree of the 29th December 1874, but was shortly afterwards dispossessed by the plaintiffs, who took possession through the Court under their purchase of the 15th March 1875. This resulted in an application being made by the defendant Gunness Chunder Sahoo under s. 269 of Act VIII of 1859, in which he was successful and regained possession. The present suit was brought by the plaintiffs to set aside the order under s. 269 and for adjudication of title.

The Court of first instance dismissed the suit with costs against the defendant Khetter Mohun Beshoye, who had in its opinion been needlessly made a party, but gave the plaintiffs a decree with costs against the defendant Gunness Chunder Sahoo. In the course of its judgment it remarked:—"It is true that the tenure was put up to sale after the defendant had obtained a decree against the plaintiffs; but the defendant had the option, in order to protect his property, to pay off the debt for which the tenure was advertised for sale. The plaintiffs had obtained their decree against Khettro (Khetter

(1) As a matter of fact they purchased his equity of redemption, but this would not have entitled them to resist the suit for possession of the mortgaged property without paying off the mortgage-debt.

“ Mohun Beshoye) previously to the defendant’s suit for possession; in execution of that decree they were not bound by any law to make Gonesh (Gunness Chunder Sahoo) a party to the execution-proceedings. Consequently, as soon as the property was advertised for sale, the defendant ought to have deposited the debt in Court, and thus saved his property; but as he did not, he must thank himself; the plea that he did not know of the attachment and sale is futile, and, I believe, falsely set up.”

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From this decision the defendant Gunness Chunder Sahoo appealed. The lower Appellate Court, while concurring generally with the Court of first instance, came to the conclusion that the defendant Gunness Chunder Sahoo had not received any notice of the execution-proceedings which resulted in the sale of the 15th March 1875, and that the plaintiffs ought to have given him notice of their claims for rent under their old decree, and to have given him an opportunity of satisfying it, and so saving the tenure from sale.

That Court, therefore, modified the decision of the Court of first instance, and decreed that should the defendant, appellant, within one month pay up the amount of the decree under which the under-tenure was sold on the 15th March 1875, with interest to the date of sale and costs of the execution, his possession should not be disturbed; and that if he failed to do so, the decree of the Court of first instance should be enforced.

From this decree the plaintiffs appealed to the High Court.

Baboo *Unnoda Persad Bannerjee* and Baboo *Bhowani Churn Dutt* for the appellants.

Baboo *Rash Behari Ghose* and Baboo *Pran Kishen Biswas* for the respondent.

The judgment of the Court was delivered by

GARTH, C. J. (who, after shortly stating the facts, continued).—The plaintiffs now appeal from this decision upon the ground, that they had by law a right to sell the tenure under

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their second decree, and that they were not bound under the circumstances to give any notice of the decree to the defendant Guinness.

The respondent, on the other hand, contends, that the plaintiffs were bound in equity to have given him notice of their decree, and that the Judge's decision founded on that obligation was correct.

But we are quite unable to discover how such an obligation arises. There is certainly no provision to that effect in the Rent Law, and no authority has been referred to by the learned pleader for the respondent, which in any way justifies his contention.

It is remarkable that, in the defendant's written statement, he never says from first to last that he was not aware of the plaintiffs' second decree; and the Munsif says, that he does not believe he was ignorant of it. It certainly is very extraordinary, if he was so; because the decree under which the sale took place was obtained so long ago as the year 1872, and the defendant since that time has been constantly engaged in litigation with reference to the tenure, and had every possible opportunity of ascertaining all particulars respecting it.

But whether he knew of the decree or not, it is quite clear, that if he had done his duty by the plaintiffs, he would have ascertained the existence of the decree, and might by paying the amount of it have protected the tenure from sale.

He obtained his decree in the foreclosure suit so long ago as December 1874; and as soon as he had then perfected his title, he was bound by s. 26 of the Rent Law (Act VIII of 1869) to register his name in the plaintiffs' sherishta. If he had done his duty in this respect, and applied for registration, he would of course have been informed of the decree, and might have paid the amount of it. The law ought not to assist persons who place themselves in a difficulty by their own breach of duty, and we see no reason whatever why in this case the plaintiffs should have been bound to inform the defendant of that, which if he had complied with the requirements of the law, he would have discovered for himself.

It is clear, that if the defendant had purchased Khetter

Mohun's interest, he could have been in no better position than Khetter Mohun, and would have been bound to find out for himself what Khetter Mohun's obligations were, and the defendant is virtually a purchaser from Khetter Mohun. He advanced his money upon security of the tenure, upon terms which, if the money was not repaid, enabled him to make the tenure his own, and he has availed himself of those terms. But he was bound of course to fulfil the requirements of his tenancy; and the obligations of the person under whom he claimed. If he had done this he would not have been a sufferer.

We were referred by the respondent's pleader to the case of *Nobeen Kishen Mookerjee v. Shib Pershad Pattuck* (1) for the purpose of showing that the zemindar is bound to recognize the title of a transferee of a transferable tenure although he has not been registered. There is nothing in that case, however, which shows that the zemindar may not sell the tenure under a decree for rent as against such a transferee, and in point of fact that case does not in any way affect our present decision.

If it did, I confess, speaking for myself, that I entertain grave doubts as to the correctness of that decision; and I should much wish to have it re-considered.

The appeal is decreed, the judgment of the lower Appellate Court will be reversed, and that of the Subordinate Judge restored, with costs in this Court and in the Court below.

Appeal allowed.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Markby.

DWARKANATH BYSACK AND ANOTHER (PLAINTIFFS) v. BURRODA
PERSAUD BYSACK (DEFENDANT).

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*Will—Charitable Bequests—Void Bequests—Uncertainty—"Surplus"—
General Residuary Bequest.*

A testator by his will directed as follows: "I do hereby direct my trustee to feed the really needy and poor at Gopeenathjee out of a separate expense out of my estate, to be contributed to the worship of Luckee-jonardunjee, my ancestral goddess. I do direct my trustee to spend suit-

(1) & W. R., 96.